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SARIPAH KULAH & ORS

v.

SARABAL ALIAN & ORS

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HIGH COURT SABAH & SARAWAK, TAWAU
LEE HENG CHEONG JC
[ORIGINATING SUMMONS NO: T-(24)-72-2011]
31 JULY 2012

C ***CIVIL PROCEDURE:*** *Declaratory reliefs - Application for - Delay in application - Whether delay explained in form of affidavits - Whether court ought to exercise discretion*

LAND LAW: *Transfer - Validity of - Transfer of land pursuant to*
D *Native Court Order - Whether transfer valid - Whether all subsequent transactions and dealings based on Order valid - Whether Order treated as conclusive evidence*

The first and second plaintiffs and the third defendant were the children of the late Kulah bin Majah ('late Kulah'), whereas the
E third plaintiff was the daughter of the first plaintiff. On 7 August 1995, the Tawau Syariah Court granted an order for the distribution of the estate of the late Kulah in respect of the land held under Native Title No. 123015403 at Pulau Pandangan, Semporna ('the said land') to the first and second plaintiffs and
F the third defendant. In 1997, the said land was transferred to the first, second and third defendants pursuant to an Order of the Semporna Native Court ('MAN Order'). On a date unknown to the plaintiffs, the first and second defendants applied to the Semporna Native Court and obtained an order in MAN No. 18/94 in respect
G of the succession of the estate of Alian bin Majah, Wah bin Majah and the late Kulah in respect of the said land in favour of the first, second and third defendants in three shares. In 2011, the first, second and third defendants had transferred the said land to the fifth defendant. In this action, the first and second plaintiffs
H claimed for the reliefs, *inter alia*: (i) that the late Kulah was the sole registered owner of the said land; (ii) that the order by the Tawau Syariah Court for the distribution of the estate of the late Kulah was legal, valid and binding; (iii) a declaration that the decision of the Semporna Native Court in MAN No. 18/94 for
I the succession of the estate of Alian bin Majah and two others was null and void; and (iv) a declaration that the transfers of the said land to the fifth defendant were null and void.

Held (dismissing application with costs):

(1) It is trite that declaratory reliefs are discretionary reliefs and the court shall not grant it as of right. On the facts, there was a delay of 55 years in petitioning for distribution and another 20 years to challenge the status of the first, second and third defendants as previous registered owners of the land. There was also no *prima facie* compelling evidence advanced by the plaintiffs, in the form of affidavits explaining the delay. The court also took into consideration the position of the fifth defendant, who was a *bona fide* purchaser of the said land for value without notice. In the circumstances, the court should not exercise its discretion to grant the reliefs sought by the plaintiffs. (para 9)

(2) The MAN Order granted by the Semporna Native Court in MAN No. 18/94 was not a nullity and consequently, all subsequent transactions and dealings based on the Semporna Native Court in MAN No. 18/94 were also valid. (para 11)

(3) In the absence of any appeal to the Native Court of Appeal, the order of distribution under MAN No. 18/94 was valid and subsisting. As such, the Order must be treated as conclusive evidence that the distribution of the land was valid and subsisting. (para 13)

Case(s) referred to:

Brunika @ Tiansoi Louin v. Mahkamah Anak Negeri Kota Kinabalu & Anor [1996] 1 LNS 276 HC ***(refd)***

In Re Len Chee Omnibus Company Ltd; Chin Sow Lan v. Lee Chee Omnibus Company Ltd & Ors [1969] 1 LNS 59 HC ***(foll)***

Joseph Paulus Lantip v. Lian Kee Chu & Ors [2011] 6 CLJ 399 CA ***(foll)***

Teng Mee Hing v. Tang Peng Khoon & Anor [2008] 1 LNS 555 HC ***(foll)***

Legislation referred to:

Land Ordinance (Cap 68) (Sabah), s. 120

Native Courts Ordinance (Cap 86) (Sabah), ss. 5, 6

For the plaintiff - Kong Hong Ming; M/s Lee & Kong

For the defendant - Liew Hon Ming; M/s Liew Hon Ming

Reported by S Barathi

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JUDGMENT

Lee Heng Cheong JC:

Introduction

B **[1]** In this action, the first and second plaintiff as beneficiaries of the estate of their father Kulah bin Majah (deceased) in respect of the land held under Native Title No. 123015403 measuring 8.562 acres at Pulau Pandangan, Semporna ("the said land") claimed the following reliefs:

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(a) A declaration that Kulah bin Majah (the deceased) was the sole registered owner of Semporna Native Title No. 123015403;

D (b) A declaration that the order dated 4 October 1995 made by Syariah Court at Tawau in MST(S): 01/05 (109) of 1995 for the distribution of the estate of Kulah bin Majah in respect of Semporna Native Title No. 123015403 is legal, valid and binding;

E (c) A declaration that the certified or replacement copy of the land title for Semporna Native Title No. 123015403 issued on 23 January 1997 under s. 120 of Land Ordinance (Cap. 68) (Sabah) is null and void;

F (d) A declaration that the first plaintiff, the second plaintiff and the third defendant are the beneficiaries of the estate of Kulah bin Majah in respect of Semporna Native Title No. 123015403 pursuant to the order dated 4 October 1995 made by the Syariah Court at Tawau in MST(S): 01/05 (109) of 1995 for the distribution of the estate of Kulah bin Majah respectively holding the undivided share of 1712/8562, 3424/8562 and 3424/8562 in the said land;

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H (e) A declaration that the decision of the Native Court at Semporna made in MAN No. 18/94 for the succession of the estate of Alian b Majah and two others in respect of Semporna Native Title No. 123015403 is null and void;

I (f) A declaration that the transfers of Semporna Native Title No. 123015403 to the first, second and third defendant *vide* memorial number 12003527 dated 2 April 1997 pursuant to the decision of Semporna Native Court in MAN No. 18/94 is null and void;

(g) A declaration that the sublease of Semporna Native Title No. 123015403 *vide* memorial number 12003607 dated 26 September 1997 to the fourth defendant and the surrender of sublease *vide* memorial number 121002318 dated 27 January 2011 are null and void;

(h) A declaration that the transfers of Semporna Native Title No. 123015403 to the fifth defendant *vide* memorial numbers 121002319 and 121002320 both dated 27 January 2011 are null and void;

(i) An order that the sixth defendant shall give full effect to the aforesaid declarations;

(j) An order that the first, second, third, fourth and/or fifth defendant shall, within 14 days from the date of the order, deliver vacant possession of Semporna Native Title No. 123015403 to the first and second plaintiff and the third defendant;

(k) An order that the first, second, third, fourth and/or fifth defendant shall, within 14 days from the date of the order, deliver the certified replacement copy of the land title for Semporna Native Title No. 123015403 to Messrs Lee & Kong, Advocates & Solicitors of Kota Kinabalu for rectification of the title by the sixth defendant including to register the transfer of Semporna Native Title No. 123015403 to the first and second plaintiff and the third defendant according to the order dated 4 October 1995 made by Syariah Court at Tawau in MST(S): 01/05 (109) of 1995 in the undivided share of 1712/8562, 3424/8562 and 3424/8562 respectively;

(l) An order that the first, second, third and fourth defendant shall jointly and severally, within 14 days from the date of the order, render accounts to the first and second plaintiff of all incomes, receipts, proceeds and any other payments made and received in respect of and pursuant to the sublease of Semporna Native Title No. 123015403 to the fourth defendant and pay to the first and second plaintiff their respective shares and entitlements in all such aforesaid incomes, receipts, proceeds and any other payments;

A (m) An order that the first, second, third and fourth defendant shall jointly and severally pay to the first and second plaintiff exemplary damages for the sum of RM100,000 or such other sum that this Honourable Court deems appropriate to grant;

B (n) An order that the first, second, third and fourth defendant shall jointly and severally pay to the first and second plaintiff interest on the said sums adjudged in prayers (l) and (m) above respectively at the rate of 8% per annum from the date of the order to the date of full payment;

C (o) Costs to the plaintiffs to be taxed.

[2] The plaintiffs have indicated that they will not proceed with prayer (l) above, seeking an order for account against the first to fourth defendant.

D **[3]** The first and second plaintiffs and the third defendant are the children of the late Kulah bin Majah whereas the third plaintiff is the daughter of the first plaintiff.

[4] On 7 August 1995, the Tawau Syariah Court heard the E application for distribution of estate No. MST(S): 01/95 (109) of 1995 and granted an order for the distribution of estate (or 'Perintah Pembahagian Harta Pesaka') on 4 October 1995 allowing the distribution of the estate of the late Kulah bin Majah in respect of the said land to the third defendant and the first and F second plaintiff in the respective undivided shares of 3424/8552, 3424/8552 and 1712/8552 (See exh. "S2", a copy of the order of Tawau Syariah Court dated 4 October 1995 as shown in pp. 17-18 of encl. 3.)

[5] Further, in 1997, the land was transferred to Sarabal, Kimda G and Ogo pursuant to an order of the Semporna Native Court ("MAN order").

[6] The plaintiffs contended that the MAN order was a nullity for want of jurisdiction, and hence, all the transactions and H dealings of the land relying on and following the MAN order, were invalid and therefore null and void and ought to be set aside.

[7] On a date unknown to the plaintiffs, the first and second defendants applied to Semporna Native Court and obtained an order in MAN No. 18/94 in respect of the succession of the I estate of Alian b Majah & two others (deceased) in respect of the said land in favour of the first, second and third defendant in three shares. The two others were Wah bin Majah and Kulah bin Majah.

[8] On 27 January 2011, the first, second and third defendants had transferred the said land to the fifth defendant. (See exh. "S6', a copy of the certified replacement copy of the land title for the said land obtained from the 6th defendant office as shown in memo sequence Nos. 4 and 5 at pp. 26C-26D of encl. 3.)

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Consideration Of The Issues

[9] In the present case, the plaintiffs are seeking in essence, for a number of declarations and consequential orders arising from such declarations. It is trite that declaratory reliefs are discretionary reliefs and the court shall not grant it as of right. I find that there is a delay of 55 years in petitioning for distribution and another 20 years to challenge the status of the first, second and third defendants as previous registered owners of the said land. I also find that there was no *prima facie* compelling evidence advanced by the plaintiffs, in the form of affidavits explaining the delay. I also take into consideration of the position of the fifth defendant, who I find, is a *bona fide* purchaser of the said land for value without notice. In the premises I shall not exercise my discretion to grant the reliefs sought by the plaintiffs.

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[10] I am guided by the followings:

(a) In the case of *Teng Mee Hing v. Tang Peng Khoon & Anor* [2008] 1 LNS 555, High Court at Sibu, case No. 22-27-2006, Haji Hamid Sultan J said:

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> … The category of cases why a declaratory relief ought not to be granted is not closed. In *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham (Executor of the Estate of Loo Cheng Ghee)* [1998] 4 CLJ 812, 2 AMR 1235, Gopal Sri Ram JCA observed;
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> It is beyond dispute that the remedy of declaration is discretionary in nature.

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(b) *In Re Len Chee Omnibus Company Ltd; Chin Sow Lan v. Lee Chee Omnibus Company Ltd & Ors* [1969] 1 LNS 59, Raja Azlan Shah (as His Royal Highness then was) said:

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> … There is another point which is against the applicant. The court, having concurrent equitable jurisdiction, is not bound to follow what a court of law would do in such a case in adjudicating under section 162 of the Companies Act but will take cognizance of well-known equitable principles. In the words of Lord Camden LC in *Smith v. Clay* a court of equity "has always refused its aid to stale demands,

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A where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive and does nothing".

B The applicant said that she became aware that her shares had been registered in her mother's name subsequent to her mother's death. That was in 1963. Letters of Administration of her estate were granted to the last three respondents in July 1966. The present summons were taken out in December 1968. That was not done within a reasonable C time after she became aware of the facts entitling her to relief. I am of the opinion that she is guilty of laches ...

[11] Further I find that the MAN order granted by Semporna Native Court in MAN No. 18/94 is not a nullity and consequently, all subsequent transactions and dealings based on D the MAN order of Semporna Native Court in MAN No. 18/94 namely the immediate transactions based on the MAN order as reflected in Memo No. 12003527 dated 2 April 1997, and all subsequent transactions as reflected in Memo No. 12003607 dated 26 September 1997, Memo No. 121002319 dated 27 January E 2011 and Memo No. 121002320 dated 27 January 2011 which relied on the said immediate transaction are also valid.

[12] In the recent Court of Appeal case of *Joseph Paulus Lantip v. Lian Kee Chu & Ors* [2011] 6 CLJ 399, it was held:

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The certificate of the Sabah Native Court declaring the first defendant as a native of Sabah, in the absence of an appeal against that declaration, was conclusive evidence that the first defendant was a native of Sabah. As it was a final decision, the High Court had correctly accepted it as such. In the G circumstances, all dealings between the first defendant and the applicants, and subsequent dealings between the first defendant and third parties were valid in law, being not in contravention of ss. 17(1) and 64(1). (paras 20 & 21)

H **[13]** In the absence of any appeal to the Native Court of Appeal, I find that the order of distribution under MAN No. 18/94 in our present case is valid and subsisting. As such this order must be treated as conclusive evidence that the distribution of the said land is valid and subsisting.

I **[14]** Further, in *Brunika @ Tiansoi Louin v. Mahkamah Anak Negeri Kota Kinabalu & Anor* [1996] 1 LNS 276, the High Court at Kota Kinabalu refused to grant leave for judicial review, on the ground that the matter was under "native law or custom" of

ss. 5 or 6 of the Native Courts Ordinance (Cap 86) (Sabah) or the Native Courts Enactment 1992. Sulaiman J (as he then was) suggested that the matter should be referred to the Native Court of Appeal.

Order

[15] In the premises I dismiss this originating summons in so far as it relates to the fifth defendant, with costs, to be taxed unless agreed.